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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 ANTHONY LUNDY, *et al.*,

Case No. 3:21-cv-00267-MMD-WGC

7 Petitioners,

ORDER

8 v.

9 DARIN BALAAM, *et al.*,

10 Respondents.
11

12 **I. SUMMARY**

13 In this represented Indian Civil Rights Act ("ICRA") habeas matter under 25 U.S.C.
14 § 1303, Petitioners Anthony Lundy, Curtis Cloud, and Justin Saldana (referenced herein
15 individually by their respective last name) challenge, *inter alia*, their continued pretrial
16 detention by Respondent Sheriff Darin Balaam (the "Sheriff") on behalf of the Washoe
17 Tribe of Nevada and California (the "Tribe" or the "Washoe Tribe") and in particular the
18 alleged cash-only bail required for release by the Washoe Tribal Court (the "Tribal Court").
19 Petitioners also names as Respondent Tribal Chairperson Serrell Smokey ("Chairperson
20 Smokey" or the "Tribal Respondent"). The matter comes before the Court following the
21 filing of a Response (ECF No. 19) by the Tribal Respondent and a Traverse (ECF No. 20)
22 by Petitioners, as well as on Petitioners' pending emergency motion for a temporary
23 restraining order (ECF No. 2). For the reasons discussed herein, the Court dismisses the
24 Petition (ECF No. 1) without prejudice for lack of full exhaustion of tribal judicial remedies.

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II. BACKGROUND

A. Overview

While, as discussed further below, the underlying particulars vary with each Petitioner, they alleged in the Petition in broad brush, *inter alia*, that: (a) each is being held on behalf of the Tribe as a pretrial detainee on allegedly misdemeanor charges with a cash-only bail requirement that each one is unable to satisfy, particularly where allegedly no bond agencies will accept bonds in a tribal court matter; (b) Petitioners thereby have remained and will remain detained indefinitely because jury trials have been postponed indefinitely in the Tribal Court due to pandemic concerns; (c) Tribal Court authorities allegedly have used the situation to try to pressure Petitioners to waive their right to a jury trial and accept a bench trial instead; and (d) they have no effective remedy of appellate review in the tribal courts because the tribal appellate court allegedly is not an actually functioning judicial body. (ECF No. 1 at 2-12.)

The parties, separately or together, allege the following regarding each respective Petitioner, their tribal court cases and the bail amount set.¹

B. Petitioner Anthony Lundy's Tribal Court Cases and Bail

Petitioners allege that Lundy is a member of the Tribe. (ECF No. 20 at 6.)

According to the Tribal Respondent and/or copies of Tribal Court records presented: (1) Lundy was convicted in April 2020 in Tribal Court Case No. CR-WT-19-047 of disorderly conduct and in No. CR-WT-19-048 for battery allegedly of his grandmother; (2) in No. CR-WT-19-047, he was given a 90-day suspended sentence and placed on probation for 12 months; and in No. CR-WT-19-048, he was sentenced to 180 days consecutive to the sentence in the other case, received credit for time served, and

¹The Court does not suggest that Petitioners admit, *inter alia*, the allegations in the charging instruments and in the referenced tribal court proceedings. Petitioners specifically contest, *inter alia*, whether "cash-only bail has been set in an amount they can afford to pay." (ECF No. 20 at 12.) In all events, in summarizing assertions of fact, allegations, and/or argument by the parties and/or in the tribal courts, the Court makes no findings of fact or credibility determinations. The Court summarizes the same solely as background to the issues presented.

1 the remaining 128 days was suspended “in lieu of 12-month probation;” (3) Lundy
2 thereafter failed to appear for three required monthly probation review hearings, and the
3 Tribal Court issued a bench warrant on February 3, 2021; (4) Lundy was charged in No.
4 CR-WT-21-010, with two counts of battery on a tribal police officer and one count of
5 interfering with law enforcement procedures, “i.e., resisting arrest” in connection with his
6 arrest on the bench warrant in late February 2021; (5) these offenses allegedly occurred
7 while Lundy was on probation in the two earlier cases, and following the three failures to
8 appear for probation review hearings; and (6) on February 24, 2021, the Tribal Court
9 initially set a \$5,000.00 cash bail, but the court reduced the bail to \$2,500.00 after a
10 hearing on Lundy’s April 28, 2021, request for a reduction in bail. (ECF No. 19 at 3-4.)²

11 **C. Petitioner Curtis Cloud’s Tribal Court Cases and Bail**

12 Petitioners allege that Cloud is not a member of the Washoe Tribe and instead is
13 an enrolled citizen of the Sisseton-Wahpeton Sioux Tribe in South Dakota.³ (ECF No. 1
14 at 25.)

15 According to the Tribal Respondent and/or copies of Tribal Court records
16 presented: (1) Cloud was convicted in October 2020 in No. CR-WT-20-023 of theft and a
17 “30-day sentence was suspended in lieu of 9-month probation;” (2) Cloud was charged in
18 or around December 2020, while on probation, in No. CR-WT-20-062, with battery and
19 possession of methamphetamine, with the battery allegedly having been committed on
20 his intimate partner; (3) Cloud initially was released on his own recognizance (“OR
21 release”) in connection with No. CR-WT-20-062 and was ordered to have no contact with

22 ²Per statute, the maximum punishment that can be imposed by a tribe for any
23 offense is imprisonment for one year, a \$5,000 fine, or both, subject to limited exceptions
24 permitting a maximum punishment of imprisonment for three years, a \$15,000 fine, or
25 both. See 25 U.S.C. § 1302(a)(7)(B)-(C) & (b).

26 The Tribal Respondent contends that an offense or offenses charged against at
27 least Lundy and Saldana would be considered felony level offenses when charged by
28 federal and/or Nevada state authorities. (ECF No. 19 at 12 & nn. 5 & 6; *id.* at 14.)

³Perhaps now the Sisseton Wahpeton Oyate of the Lake Traverse Reservation.
See https://en.wikipedia.org/wiki/Sisseton_Wahpeton_Oyate (retrieved July 2021).

1 the alleged victim pending trial; (4) however, Cloud failed to appear at a pretrial hearing
2 on April 14, 2021; and the Tribal Court issued a bench warrant; (5) on April 15, 2021,
3 Cloud was arrested on the bench warrant as well as on new offenses that he allegedly
4 committed while on probation in connection with No. CR-WT-20-023 and on OR release
5 subject to the no-contact condition in connection with No. CR-WT-20-062; (6) Cloud
6 thereupon was charged in No. CR-WT-21-021 with disorderly conduct and another
7 battery allegedly on his intimate partner, an alleged violation of also the no-contact order,
8 including allegations that he threatened to, *inter alia*, burn down the recreational vehicle
9 in which the victim lived; and (7) Cloud was released on his OR in No. CR-WT-21-021
10 but, following upon the new charges, the Tribal Court revoked Cloud's earlier OR release
11 in No. CR-WT-20-062 and set a \$1,000.00 cash bail. (ECF No. 19 at 4-5 & 12-13; see
12 also ECF No. 1 at 50-51; ECF No. 19-3 at 2-3.)

13 **D. Petitioner Justin Saldana's Tribal Court Cases and Bail**

14 Petitioners and the Tribal Respondent allege that Saldana is not a member of the
15 Washoe Tribe and instead is a member of the Lac du Flambeau Band of Lake Superior
16 Chippewa located within the state of Wisconsin. (ECF No. 1 at 25; ECF No. 19 at 14; ECF
17 No. 20 at 5.)

18 According to the Tribal Respondent and/or copies of Tribal Court records
19 presented: (1) Saldana has two pending cases in the Tribal Court with the alleged victim
20 allegedly being his intimate partner, with whom he has a child; (2) in No. CR-WT-21-033,
21 Saldana is charged with having committed disorderly conduct, aggravated trespass, and
22 criminal mischief on or about March 10, 2021, based on Saldana allegedly damaging the
23 victim's front door by kicking the door and/or stabbing the door with a knife; (3) Saldana
24 allegedly left the scene before officers arrived and thus was not arrested at that time; (4)
25 in No. CR-WT-21-028, Saldana is charged with having committed domestic violence
26 battery, unlawful restraint, assault with a deadly weapon, and aggravated stalking on or
27 about May 9, 2021, based on Saldana allegedly: (a) punching, hitting, kneeing and/or
28 kicking the victim numerous times on the head, arms and/or legs causing fracture(s),

1 bruising, and/or lacerations to her face, head and/or body; (b) placing his hands around
2 her neck and choking her; (c) holding a knife to her throat, neck and/or stomach; and (d)
3 causing her to feel terrorized, frightened and/or intimidated and placing her in reasonable
4 fear of death or substantial bodily harm; (5) on May 12, 2021, the Tribal Court set bail at
5 \$2,500.00 in No. CR-WT-21-033 and \$8,500.00 in No. CR-WT-21-028, for total
6 \$11,000.00 cash bail, with the order expressly being “without prejudice to bring a further
7 bail hearing in future;”⁴ (6) the alleged victim requested a domestic violence protective
8 order, alleging that she was scared and feared for her safety, which the Tribal Court
9 granted also on May 12, 2021; (7) allegedly the sole reason for Saldana being within the
10 tribal jurisdiction is to visit his child; and he allegedly otherwise has no family,
11 employment, permanent residence, vehicle registration, land ownership or other
12 community ties to the tribal jurisdiction; and (8) the Tribe has no extradition agreement
13 with either the State of Wisconsin or the Lac du Flambeau Band of Lake Superior
14 Chippewa. (ECF No. 19 at 5 & 13-14; see *also* ECF No. 1 at 52-58.)

15 **E. Tribal Emergency COVID-19 Orders and Petitioners’ Trial Settings**

16 ICRA assures both a right to a jury trial on a tribal offense punishable by
17 imprisonment and a right to a speedy and public trial. See 25 U.S.C. § 1302(a)(6) & (10).

18 The relevant tribal rule provides that defendants have the right to a speedy and
19 public trial within 180 days of arraignment. (See, *e.g.*, ECF No. 19-4 at 2.)

20 In response to the COVID-19 pandemic, the Washoe Tribal Council and the Tribal
21 Court collectively issued several emergency provisions, including provisions on March 16
22 and 17, 2020, suspending both the above 180-day rule and the holding of jury trials. (See
23 ECF No. 19-4; ECF No. 19-5 at 9, 15.)

24 The Tribal Respondent asserts that trial is set in Lundy’s pending cases on August
25 16, 2021; on Cloud’s pending cases on October 18, 2021; and on Saldana’s two cases
26 separately on December 9, 2021, and January 6, 2022. Respondent asserts that: (1)

27
28 ⁴(ECF No. 1 at 53.)

1 “[a]lthough the Washoe Tribe and Tribal Court *have not declared a full opening of tribal*
2 *offices and tribal court*, the court is setting jury trials *in anticipation of dates the court will*
3 *be fully open* and members of the tribe (jurors, court staff, bailiffs, witnesses, attorneys,
4 defendants, police officers) can safely return to the tribal court and participate in jury
5 trials;” (2) the Tribal Court has set ten other jury trials in addition to the Petitioner’s
6 respective trials, “with Lundy’s the first to go on August 16, 2021;” (3) trials have not been
7 set in July 2021 at the request of defense counsel for most defendants, who is preparing
8 for the Nevada bar exam; and (4) no trials have been set in September and early October
9 because the Tribal Court will be closed to move into a new tribal court building. (ECF No.
10 19 at 4-5, 18-19 (emphasis added).)

11 Petitioners urge that the Tribal Respondent’s “recitation of the jury trial dates for
12 Petitioners is misleading because the Tribe has not lifted its state of emergency,” that “it
13 is intentionally confusing to state that Anthony Lundy will have a jury trial on August 16
14 while simultaneously suspending all jury trials,” and that Respondent “failed to advise the
15 Court of the suspension of all jury trials when reciting the Petitioners’ trial dates.” (ECF
16 No. 20 at 2-3; *but cf.* ECF No. 19 at 16-17; ECF No. 19-4; ECF No. 19-5 at 9, 15.)

17 **F. Petitioners’ Tribal Court Habeas Petition**

18 On May 21, 2021, Petitioners filed a joint habeas petition in the Tribal Court
19 presenting substantially the same claims, allegations and arguments (as applicable
20 through that date) as they later presented in the federal petition. Petitioners named as
21 respondents the Sheriff and Chairperson Smokey as well as the Sheriff’s detention
22 captain and all eleven representatives serving with Smokey on the Tribal Council. The
23 petition was purportedly served only via email. (ECF No. 1 at 14-22.)

24 Petitioners allege that Lundy has been detained since February 17, 2021, Cloud
25 since April 15, 2021, and Saldana since May 9, 2021. (ECF No. 1 at 4-6.) Based on these
26 allegations, Lundy, Cloud and Saldana had been detained 93, 36 and 12 days
27 respectively at the time of the filing of the tribal court habeas petition.

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1 Three days after the filing of the petition, on May 24, 2021, the Tribal Court issued
2 an order dismissing the petition without prejudice to Lundy, Cloud and Saldana each filing
3 separate individual petitions correcting the procedural deficiencies identified by the court
4 in its order. The Tribal Court held, *inter alia*, that: (1) the petition had not been properly
5 served because email service was not permitted under the relevant rules: (2) the petition
6 was not verified as required by the same; and (3) the petitioners (referred to by the court
7 as the defendants, in reference to the original criminal proceedings) were not similarly
8 situated and thus were improperly joined because: (a) Cloud and Saldana were not
9 members of the Washoe Tribe and thus were not afforded all rights accorded to Lundy
10 under the tribal constitution; (b) Lundy and Cloud had no-bail holds in one case each for
11 probation revocation hearings (with each electing to hold the same concurrently with a
12 jury trial setting) whereas Saldana was held on only pretrial bail in both of his two cases;
13 and (c) Lundy and Cloud each further had an OR release order in one of their respective
14 cases. (ECF No. 1 at 23-27; see *also* ECF No. 17-1 at 3-4; ECF No. 19 at 7-8, 18.)⁵

15 **G. Petitioners' Emergency Inter-Tribal Appeal**

16 Three days later, on Thursday, May 27, 2021, Petitioners filed a "Notice of
17 Emergency Appeal to InterTribal Court of Appeals Nevada" in the Tribal Court. Service of
18 the notice of appeal once again purportedly was effected by email. Over and above
19 functioning as a notice of appeal, the filing set forth six pages of principally single-spaced
20 legal and factual argument seeking to support Petitioners' request for emergency
21 appellate relief. (ECF No. 1, at 28-36.)

22 Two weeks later, on Thursday, June 10, 2021, Petitioners filed the instant Petition
23 in this Court. With regard specifically to the emergency appeal, Petitioners alleged that:
24 (1) "the Inter-Tribal Court of Appeals is not functioning at all;" (2) "Petitioners are therefore
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26 ⁵The copy of the Tribal Court order attached with the Petition appears to be
27 incomplete and further includes a duplicate page, suggesting a clerical copying error
28 when the exhibit was prepared for filing. The content of the Tribal Court order is not
disputed by the parties and further is to relevant extent summarized by the inter-tribal
appellate court order.

1 unable to have their appeal rudimentarily processed, much less adjudicated,” and (3) “the
2 Petitioners only forum for review of the legality of their detention under the Indian Civil
3 Rights Act is in this Court.” (ECF No. 1 at 4.) Petitioners elaborated that: (1) “Petitioners’
4 on-line search for the Inter-Tribal Court of Appeals consistently returns to a blank page
5 (except for a small photograph of Charles Dressler in the sidebar) on the Inter-Tribal
6 Council website;” (2) “Petitioners . . . also contacted the Bureau of Indian Affairs ([“]BIA[“])
7 for the Western Region [by email] to determine if that appellate body might accept their
8 appeal” but “[t]he BIA court clerk stated [by return email] that the BIA does not accept
9 appeals from the Washoe Tribal Court, and she does not know who does;” and (3) “[t]he
10 court of appeals required by the Washoe Tribal Code (The Inter-Tribal Court of Appeals
11 of Nevada) does not exist, except in name, and no other court will accept the Petitioners’
12 appeal.” (*Id.* at 8.)⁶

13 ⁶Petitioners’ alleged June 3, 2021, email referenced in the text does not itself
14 indicate the addressee’s office, role or employing division within the BIA. In her alleged
15 response, she referred to herself as a Tribal Government Specialist with the Southern
16 Plains Region for the BIA, in Anadarko, Oklahoma. (ECF No. 1 at 63-65.) Nothing in the
17 alleged email exchange in the record would reflect that the particular addressee’s lack of
18 knowledge regarding appellate remedies vis-à-vis a habeas proceeding in the Washoe
19 Tribal Court within Nevada necessarily would signify that there was no functioning
20 appellate court available.

21 Petitioners also attached with the Petition a June 2, 2021, purported email sent to
22 “info@itcn.org” reflecting that counsel had called the appellate court twice, was trying to
23 determine whether there was a court coordinator handling the emergency appeal and
24 was requesting a prompt response because Petitioners were in custody. (*Id.* at 60-61.)

25 The material presented does not affirmatively reflect that Petitioners contacted the
26 Tribal Court clerk, *i.e.*, the lower court clerk, directly to inquire as to: (a) whether the
27 appeal(s) had been docketed and transmitted to the appellate court; and (b) who to
28 contact with the appellate court to inquire further on status and how to contact them.

29 In all events, as reflected in the text that follows, the appellate court in fact was
30 functioning and issued a decision and order on Petitioners’ emergency appeal(s) on June
31 21, 2021. However, Petitioners’ own efforts to contact the appellate court and perhaps
other officials *ex parte* regarding the processing of the appeal does pertain to argument
by Petitioners on the exhaustion issue, as discussed further *infra*.

Finally, copies of alleged emails are neither self-authenticating nor necessarily
competent evidence of factual assertions made therein. The alleged emails have not been

1 On June 21, 2021, the Inter-Tribal Court of Appeals of Nevada (the “Inter-Tribal
2 Appeals Court”) issued a Decision and Order on the pending emergency appeal. The
3 court noted that there were a number of alleged procedural defects and unresolved
4 defenses vis-à-vis the tribal habeas petition, including that “it may be that habeas corpus
5 is not available since Appellants’ remedies, if any, should only be pursued in the
6 underlying criminal matters.” (ECF No. 17-1 at 4.) The court did not reach these issues,
7 however, because “the issue of consolidation of actions is dispositive of this appeal.” (*Id.*)

8 The Inter-Tribal Appeals Court held as follows on the issue of consolidation or
9 joinder, while expressly eschewing any holding on the merits of the underlying claims:

10 The trial court has broad discretion to consolidate actions. *Nalder v.*
11 *Eighth Judicial District Court*, 462 P.3d 677, 684 (Nevada, 2020) (citing a
12 similar federal rule). We review *de novo* the lower court’s ruling on questions
13 of law. *In re: Padilla Estate*, ITCAN/AC-CV-18-006, 2 (ITCAN, 2018).
14 Consolidation is appropriate when actions involve common questions of law
15 or fact. *Liberty Mutual Insurance Group v. Panelized Structures, Inc.*, 2012
WL 13048972 (D. Nevada, 2012). The voluminous record before the trial
16 court for each of Appellant’s criminal cases is clear: claims and defenses of
17 the parties are dissimilar and joinder in one action is therefore inappropriate.
18 The trial court’s order of dismissal on this basis is therefore affirmed.

19 This Court emphasizes that its disposition addresses one and only
20 one underlying procedural issue, that joinder and consolidation of these
21 three actions is inappropriate. These cases must be filed and tried
22 separately. This Court’s decision is not a substantive ruling on the merits of
23 any claim or defense, nor do we express any opinion regarding any claim
24 and defense, whether habeas corpus is an appropriate remedy in place of
25 proceeding in the underlying criminal cases, or whether any party-
26 respondent is properly joined or subject to the Court’s jurisdiction. These
27 are matters best left to the trial court in the first instance.

28 (*Id.*)

The appeals court further spoke, however, to the concern underlying the
emergency appeal—Petitioners’ continued detention:

properly authenticated, and the factual assertions therein have not been supported by
competent evidence. The Petition further was not verified as required by 28 U.S.C. § 2242
as to the assertions therein. Particularly given, *inter alia*, that Petitioners were incorrect
regarding the functionality of the inter-tribal appellate court, evidentiary requirements
regarding authenticity, competence and personal knowledge remain important.

1 The trial court must promptly dispose of all claims and defenses in
2 refiled separate actions, including motions for pretrial release. These
3 matters must be litigated on an expedited basis because Appellants are in
4 custody. This Court provides minimal direction of this process which is set
5 out in the Order on Appeal. There are at least two reasons for doing so.
6 Appellants are in custody. Some appear to have languished for a long
7 period of time. Whether they may be freed pending trial is of the utmost
8 importance. These matters have been addressed by the lower court to
9 some extent in the criminal cases. However, the filing of a new case entitles
10 Appellants to revisit their custodial situation. And the trial court may rule on
11 custody matters in any case, *sua sponte*. Second, it is apparent that these
12 cases may be back before this Court. We therefore exercise our discretion
13 to briefly set out the procedure in which the lower court must process certain
14 matters in each case. . . .

15 (*Id.* at 4-5 (ending citations omitted).)

16 The appeals court accordingly ordered, *inter alia*, that: (1) the trial court order of
17 dismissal was affirmed “without prejudice to Appellants’ right on remand to file and pursue
18 their claims in separate actions;” (2) on the remand, “Appellants may file their separate
19 actions no later than twenty (20) days of the date of this Decision and Order;” (3) “[f]or
20 each refiled matter, the trial court shall expedite and dispose of all claims and defenses
21 with proper findings of fact, conclusions of law and final judgments within sixty (60) days
22 of the refiling;” and (4)(a) “with the refiling of separate actions Appellant in each case must
23 file a motion addressing pretrial release from custody and all conditions attendant
24 thereto;” (b) “[t]he Court may also rule on custody matters *sua sponte*,” and (c) “Appellants
25 may elect to address custody and release in any pending criminal case in which they are
26 parties since this may be an efficacious procedure to resolve their status.” The appeals
27 court further retained “jurisdiction to entertain interlocutory appeals from lower court
28 orders pertaining to custody and release of Appellants in any case,” or to enforce its
mandate. (*Id.* at 5.)

29 **H. Federal Proceedings**

30 As noted, this action was filed on June 10, 2021, during the pendency of
31 Petitioners’ emergency appeal, premised in part on there being no functioning tribal
32 appellate court. Petitioners have moved herein for a temporary restraining order (“TRO”)
33 directing their release on their own recognizance until bail hearings are held in the Tribal

1 Court “that considers all alternatives to cash-only bail; and, if cash-only bail is set, then it
2 must be set in and amount the Movants can pay.” (ECF No. 2 at 9.)

3 While efforts to give actual notice of the TRO motion were made, Petitioners
4 apparently sought to effect service of the Petition via email, as in the Tribal Court and
5 Inter-Tribal Appeals Court. (See ECF No. 2 at 23.) This Court, *inter alia*, directed proper
6 formal service under Rule 4 of the Federal Rules of Civil Procedure and a prompt
7 response following service as per the procedures outlined in 28 U.S.C. § 2243.

8 The Sheriff was served promptly and filed a motion to dismiss the Sheriff as a
9 respondent, which the Court denied. When the initial return of service as to Chairperson
10 Smokey appeared to reflect that he still might be expeditiously served, the Court directed
11 the filing of a supplemental return of service either reflecting service or establishing the
12 futility of further efforts. (ECF Nos. 11-16.)

13 Chairperson Smokey was promptly served thereafter and filed a Response that,
14 *inter alia*, challenged whether tribal judicial remedies had been fully exhausted.
15 Petitioners filed a Traverse that, *inter alia*, responded to the exhaustion defense.⁷ The
16 matter thus is properly postured for decision on, *inter alia*, the exhaustion issue.

17 **III. GOVERNING LAW**

18 Native American tribes retain limited sovereignty, including sovereign immunity
19 from suit. A Native American in what is termed “Indian country” in statutory law generally
20 thus has no protection under the Constitution vis-à-vis action by a tribe and may not sue
21 the tribe in federal court. However, in the ICRA, Congress both adopted a statutorily-
22 created limited bill of rights in 25 USC §1302 and allowed for a writ of habeas corpus to
23 be brought under 25 U.S.C. §1303 as the exclusive means to challenge tribal detention
24 in federal court. See generally *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-72 (1978);

25
26 ⁷A traverse more typically is referred to currently as a reply in federal habeas
27 practice. See Rule 5(e) of the Rules Governing Section 2254 Cases (the “Habeas Rules”).
28 While the Court may utilize the Habeas Rules in other types of habeas proceedings in its
discretion pursuant to Habeas Rule 1(b), the Court has followed Petitioners’ nomenclature
in this particular regard.

1 (*Russell*) *Means v. Navajo Nation*, 432 F.3d 924, 930, 932 & 935 (9th Cir. 2005); see also
2 *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (regarding terminology). That statutory
3 bill of rights includes, *inter alia*, excessive bail, speedy trial, and jury trial protections. See
4 25 USC §1302(6), (7)(A) & (10).

5 The §1303 habeas remedy, however, generally is subject to a prudential
6 exhaustion requirement. See, e.g., *Selam v. Warm Springs Tribal Correctional Facility*,
7 134 F.3d 948, 953 (9th Cir. 1998). The principles governing the application of this
8 exhaustion requirement in tribal habeas cases under §1303 are drawn from general tribal
9 exhaustion case law arising in a wide variety of contexts, including general civil litigation.
10 See, e.g., *id.* (drawing governing principles from prior Supreme Court tribal exhaustion
11 law in general civil litigation). Under that caselaw, non-exhaustion does not deprive the
12 federal court of jurisdiction; but full exhaustion of available tribal remedies nonetheless is
13 a prerequisite to a federal court's exercise of jurisdiction under §1303. See, e.g., *Alvarez*
14 *v. Lopez*, 835 F.3d 1024, 1027 (9th Cir. 2016) (§ 1303 habeas); *Grand Canyon Skywalk*
15 *Dev., LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1200 (9th Cir. 2013) ("*Grand Canyon*
16 *Skywalk*").

17 Considerations of comity to the sovereign tribes and a policy of facilitating tribal
18 self-government has led the Supreme Court to strongly discourage federal courts from
19 assuming jurisdiction over unexhausted claims. See, e.g., *Selam*, 134 F.3d at 953. This
20 "federal policy of promoting tribal self-government encompasses the development of the
21 entire trial court system, including appellate courts," as a federal court's exercise of
22 jurisdiction over unexhausted claims "can impair the authority of tribal courts." *Id.*
23 (quoting prior Supreme Court authority). Generally, a federal court thus must figuratively
24 stay its hand unless and until the tribal courts in the first instance have "had a full
25 opportunity . . . to rectify any errors [they] may have made." *Id.* (same).

26 Exhaustion is not an inflexible requirement, however; and the district court must
27 engage in a balancing process in which it weighs "the need to preserve the cultural
28 identity of the tribal courts by strengthening the authority of the tribal courts, against the

1 need to immediately adjudicate alleged deprivations of individual rights.” *Id.* (quoting prior
2 Ninth Circuit authority).

3 The balance will shift toward excusing the exhaustion requirement where, *inter*
4 *alia*: (1) the tribal courts’ procedures are not consistent with ICRA; (2) exhaustion would
5 be futile; or (3) the tribal courts offer no adequate remedy. *See, e.g., id.*

6 **IV. DISCUSSION**

7 **A. Exhaustion by Members of Other Tribes**

8 On a potentially threshold issue in part, Petitioners contend that Cloud and
9 Saldana are not required to exhaust tribal remedies because they are not members of the
10 Washoe Tribe and are members instead of other tribes. Petitioners rely on language in
11 *Selam, supra*, that states: “[W]hen a tribal court attempts to exercise criminal jurisdiction
12 over a person not a member of a tribe, no requirement of exhaustion need be enforced.”
13 134 F.3d at 954 (quoting prior authority discussed further *infra*). (ECF No. 20 at 5-6.)

14 As backdrop, the Supreme Court held in *Duro v. Reina*, 495 U.S. 676 (1990), that
15 the residual inherent sovereignty retained by tribes extended to the exercise of criminal
16 jurisdiction only over the prosecuting tribe’s members and not also over members of other
17 tribes allegedly committing offenses within the tribe’s territorial jurisdiction. Congress
18 immediately disagreed. In 1990 amendments to ICRA, Congress affirmed its view that
19 inherent tribal sovereignty instead did extend to the exercise of criminal jurisdiction over
20 members of other tribes within the prosecuting tribe’s territorial jurisdiction. Congress
21 adopted positive legislation reflecting its view of tribal sovereignty. *See* 25 U.S.C. §
22 1301(2); *see also generally United States v. Lara*, 541 U.S. 193, 197-98 & 199 (2004);
23 *United States v. Enas*, 255 F.3d 662, 668-71 (9th Cir. 2001) (*en banc*). Two branches of
24 the federal government thus had reached diametrically opposed conclusions regarding
25 inherent tribal sovereignty vis-à-vis criminal jurisdiction over members of other tribes.

26 In its 2004 decision in *United States v. Lara*, the Supreme Court held that—due to,
27 *inter alia*, Congress’ plenary authority over Indian matters under the Constitution—
28 Congress could, as phrased by the high court, “relax” restrictions that previously had been

1 imposed on inherent tribal sovereignty and “restore” aspects of that sovereignty. 541 U.S.
2 at 200-07, 210. A tribal conviction of a nonmember Indian thus did not give rise to double
3 jeopardy protection against a following federal prosecution because the conviction was
4 obtained via the tribe’s inherent sovereignty as opposed to merely federal authority
5 delegated by Congress in the 1990 amendments to ICRA. The dual sovereignty principle
6 thus applied, notwithstanding the Supreme Court’s earlier holding to the contrary in *Duro*
7 regarding the reach then of retained inherent tribal sovereignty. See *id.*, at 197-99, 210.
8 Congress’ view of inherent tribal sovereignty accordingly was the one that ultimately
9 prevailed over that of the Supreme Court in *Duro* after the 1990 amendments to ICRA.

10 The Ninth Circuit similarly has concluded *en banc* that the Congressional view
11 prevailed in its 2001 decision in *United States v. Enas*, following a somewhat different
12 analysis. See 255 F.3d at 673-75.

13 The language relied upon by Petitioners here originated in the 1995 Ninth Circuit
14 decision in *Wetsit v. Stafne*, 44 F.3d 823 (9th Cir. 1995). In *Wetsit*, the petitioner was a
15 member of the prosecuting tribe and was convicted of offenses within the reservation that
16 occurred after the effective date of the 1990 amendments to ICRA. See *id.* at 824. The
17 case thus had nothing to do with either a tribal assertion of criminal jurisdiction over a
18 nonmember Indian or the exhaustion requirement as applied to a nonmember Indian
19 seeking §1303 habeas relief. The panel nonetheless volunteered the following:

20 *Exhaustion of Remedies.* Following the precedent of *Duro* we have
21 examined the question of jurisdiction prior to the question of exhaustion of
22 remedies. In *Duro* the federal district court entertained a habeas petition
23 immediately after the tribal court had denied the petitioner’s motion to
24 dismiss. No objection to the petition was made on the ground that the
25 petitioner had not exhausted his tribal remedies. We infer that when a tribal
26 court attempts to exercise criminal jurisdiction over a person not a member
of a tribe, no requirement of exhaustion need be enforced. It is different
when the petitioner is a member of the tribe. Then, by virtue of her consent
to tribal membership, she is bound to follow the procedures of the tribe if
they are consistent with the Indian Civil Rights Act. Having failed to do so,
she is not entitled to have her petition for habeas relief considered.

27 (*Id.* at 826 (*italics in original*).)

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1 The *Wetsit* panel thus drew an inference—in what clearly was *dicta*—about
2 exhaustion by nonmember Indians from the jurisdictional holding in *Duro* regarding the
3 reach of tribal criminal jurisdiction that disregarded the 1990 amendments to ICRA. The
4 *Wetsit* panel further did not have the benefit in 1995 of the 2001 and 2004 holdings
5 respectively by the Ninth Circuit *en banc* and the Supreme Court establishing that
6 Congress’ contrary view of the extent of inherent tribal sovereignty and jurisdiction
7 ultimately controlled over that of the Supreme Court in *Duro* following the 1990
8 amendments to ICRA. The intervening, and controlling, *Enas* and *Lara* decisions wholly
9 undercut the *Duro*-based jurisdictional premise upon which the *Wetsit dicta* was based.

10 If it *had* been the law in 1992 that tribes could not exercise criminal jurisdiction over
11 nonmember Indians, the *Wetsit dicta* then fully would have made sense under established
12 principles regarding exhaustion of tribal judicial remedies. Under established law from
13 which §1303 habeas exhaustion rules ultimately are derived, litigants who are not
14 members of the tribe in question—including even non-Indians—must exhaust tribal
15 remedies if the tribe’s assertion of jurisdiction in the tribal proceedings is colorable or
16 plausible. See, e.g., *Window Rock Unified School District v. Reeves*, 861 F.3d 894, 897-
17 98 (9th Cir. 2017) (“*Window Rock*”); *Boozer v. Wilder*, 381 F.3d 931, 935 (9th Cir. 2004).
18 If the tribe has no colorable or plausible basis for jurisdiction, then exhaustion is not
19 required. See *Window Rock*, 861 F.3d at 898. The *Wetsit dicta* thus would have been
20 wholly correct if *Duro* still had been good law in 1992 and the tribe could not have
21 exercised criminal jurisdiction over a nonmember Indian. In 1992, however, tribes had
22 criminal jurisdiction over nonmember Indians under the 1990 amendments to ICRA. The
23 *Wetsit dicta* thus wholly conflicted with rather than found support in long-established
24 principles regarding exhaustion of tribal remedies.

25 The same points apply fully to the 1998 *Selam* panel opinion, which quoted the
26 same material from *Wetsit* that is quoted above in the text. See 134 F.3d at 954. As in
27 *Wetsit*, the petitioner in *Selam* was a member of the prosecuting tribe convicted of
28 offenses within that tribe’s territorial jurisdiction that occurred after the effective date of

1 the 1990 amendments to ICRA. Any statement in *Selam* about criminal jurisdiction over,
2 and exhaustion by, nonmember Indians thus was—just as in *Wetsit dicta*. Further, any
3 reliance on in turn *Wetsit*'s reliance on the jurisdictional holding in *Duro* was misplaced
4 because that holding had been legislatively overruled by Congress. And, also similar to
5 the *Wetsit dicta* initially, *Selam*'s repetition of that *dicta* was made without the benefit of
6 the intervening controlling authority in *Enas* and *Lara*.

7 A panel repeated the *Wetsit dicta* once again in (*David*) *Means v. Northern*
8 *Cheyenne Tribal Court*, 154 F.3d 941 (9th Cir. 1998), but the offense predated the 1990
9 ICRA amendments and the underlying jurisdictional holding in *Means* further was
10 expressly overruled *en banc* in *Enas*. See 255 F.3d at 665, 671-72, 675 n.8. In *Means*,
11 the prosecuting tribe asserted criminal jurisdiction over a nonmember Indian for offenses
12 predating the effective date of the 1990 amendments. The panel held, *inter alia*, that
13 Congress did not have the power to nullify *Duro* with respect to the inherent reach of tribal
14 sovereignty vis-à-vis the assertion of criminal jurisdiction over nonmember Indians. See
15 *Means*, 154 F.3d at 946-47; see also *Enas*, 255 F.3d at 671-72. Against the backdrop of
16 this holding and a holding that the 1990 amendments did not apply retroactively, the
17 *Means* panel repeated the *Wetsit dicta* that exhaustion was not required where a tribal
18 court attempted to exercise jurisdiction over a nonmember Indian. See 154 F.3d at 949.
19 This repetition of the *Wetsit dicta* arguably could be regarded to itself be *dicta* because
20 the panel concluded that *Means* had exhausted tribal remedies. See *id.* Moreover, the
21 panel opinion was not directed to a prosecution, such as the prosecution here, for
22 offenses postdating the effective date of the 1990 amendments. In all events, however,
23 the panel's underlying jurisdictional holding regarding Congress' authority to abrogate
24 *Duro* regarding the reach of inherent tribal sovereignty was expressly overruled in *Enas*.⁸

25 ⁸The *en banc* court did "not disturb, however, the holding in *Means* regarding
26 retroactivity and the Ex Post Facto Clause." 255 F.3d at 675 n.8. These express
27 limitations on the extent to which *Means* was overruled reinforce the inapplicability of any
28 conclusion, regarding exhaustion or otherwise, in *Means* to this case, where the offenses
instead indisputably are subject to the 1990 amendments to ICRA. Again, a conclusion
that a nonmember Indian is not required to exhaust tribal remedies makes sense only

1 In the ensuing now approaching three decades since *Wetsit*, it does not appear
2 that any court, including the Ninth Circuit, has followed the *Wetsit dicta* to hold that a
3 nonmember Indian need not exhaust tribal remedies vis-à-vis a prosecution for offenses
4 postdating the 1990 ICRA amendments where the prosecuting tribe, as here, thus
5 indisputably has jurisdiction. The *Wetsit dicta* instead “has not been followed and has
6 been criticized as ‘without merit and incorrect.’” 1 F. Cohen, *Handbook of Federal Indian*
7 *Law* § 9.09 (N. Newton ed. 2012) (quoting *Lyda v. Tah-Bone*, 962 F. Supp. 1434, 1435
8 (D. Utah 1997)); see also (*Russell*) *Means*, 432 F.3d at 928 (finding that the nonmember
9 Indian exhausted tribal remedies on his jurisdictional challenge).

10 In sum, Petitioners rely on 26-year-old *dicta* that disregarded the legislative
11 overruling of the Supreme Court authority, *Duro*, relied upon in the *dicta* and further did
12 not have the benefit of the intervening *Enas* and *Lara* decisions confirming that *Duro* had
13 been abrogated with regard to the ambit of inherent tribal sovereignty.

14 The Court thus does not view the *dicta* that originated in *Wetsit* as either binding
15 on this Court vis-à-vis offenses postdating the 1990 amendments or as a correct
16 statement of the law for that situation, particularly given the intervening controlling Ninth
17 Circuit *en banc* and Supreme Court precedent respectively in *Enas* and *Lara*. The Court
18 accordingly holds that Cloud and Saldana also must satisfy the exhaustion requirement.

19 **B. Petitioners Have Not Satisfied the Exhaustion Requirement**

20 Petitioners have not fully exhausted then-available tribal judicial remedies.
21 Petitioners’ effort to pursue a joint tribal habeas petition in the Tribal Court was found to
22 be procedurally deficient by both that court and the Inter-Tribal Appeals Court. Both of
23 those courts clearly set forth what they viewed to instead be procedurally proper avenues
24 for Petitioners to expeditiously pursue their respective challenges to their continued

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26 within a context where the prosecuting tribe clearly does not have criminal jurisdiction to
27 prosecute a nonmember Indian. Following the 1990 amendments, *Enas*, and *Lara*, a tribe
28 clearly has criminal jurisdiction to prosecute a nonmember Indian. Any conclusion stated
in *Means* regarding the exhaustion requirement in a context not governed by the 1990
amendments has no application to a case instead subject to the amendments.

1 detention. Petitioners instead have proceeded to federal court, initially on what fairly
2 quickly proved to be an incorrect assumption that there was no functioning appellate court
3 hearing their emergency tribal appeal. Particularly following upon the Inter-Tribal Appeals
4 Court decision and order, this Court can consider Petitioners' claims on the merits only
5 by disregarding the fundamental principles of comity and respect for the sovereignty and
6 self-governance of the Tribe and the tribal courts that undergird the prudential tribal
7 exhaustion requirement. Those courts should be allowed the opportunity to consider, and
8 potentially correct, the alleged violations of ICRA on challenges pursued instead via
9 procedurally proper vehicles.

10 Weighing the need to strengthen the authority of the tribal courts against the need
11 for immediate adjudication of the alleged deprivation of Petitioners' rights, the Court
12 concludes that the balance leans substantially in favor of requiring full exhaustion in this
13 case. While Petitioners' detention is continuing, the tribal courts clearly stand ready, and
14 have stood ready since the dismissal of the original joint petition without prejudice, to hear
15 their respective individual challenges to continued detention on cash-only bail. While, as
16 discussed further *infra*, Petitioners disagree with the tribal courts' procedural holdings, it
17 nonetheless always has been an integral principle vis-à-vis exhaustion in another
18 sovereign's courts that the litigant generally must comply with that sovereign's procedural
19 requirements for exhausting a claim.⁹

20 The Court makes the holding herein fully cognizant of the fact that Petitioners have
21 filed an emergency motion for a TRO pursuant to Rule 65(b) of the Federal Rules of Civil
22 Procedure. They contend that they are being denied their rights under ICRA with every
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24 ⁹*Cf. Coleman v. Thompson*, 501 U.S. 722, 732 (1991) ("a habeas petitioner who
25 has failed to meet the State's procedural requirements for presenting his federal claims
26 has deprived the state courts of an opportunity to address those claims in the first
27 instance"); *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (presentation of a claim in a
28 procedural manner where the merits will not be considered absent special circumstances
does not fairly present and exhaust a claim); see also 1 F. Cohen, *supra* (suggesting that
procedural default doctrine principles from state habeas matters appropriately are
followed in tribal habeas matters).

1 continuing day of detention. While the Court does not categorically rule out the application
2 of Rule 65(b) in a habeas proceeding, the Court notes that the Federal Rules of Civil
3 Procedure do not inexorably apply without qualification in habeas matters. See, e.g.,
4 Habeas Rules 1(b) & 12. In habeas matters, including in habeas matters challenging
5 pretrial detention such as here, the remedy more traditionally provided—on a successful
6 claim on the merits—instead is a conditional grant of a writ of habeas corpus providing
7 that the petitioner must be released if the error is not corrected within a specified time.
8 See, e.g., *Arevalo v. Hennessy*, 882 F.3d 763, 767-68 (9th Cir. 2018) (directing that the
9 district court issue a conditional writ grant ordering the petitioner’s release if a sufficient
10 bail hearing was not provided within 14 days); *Harvest v. Castro*, 531 F.3d 737, 741-42
11 (9th Cir. 2008) (regarding conditional writ grants generally). The TRO remedy sought by
12 Petitioners in contrast would direct their immediate release *until* a sufficient bail hearing
13 is held, and further on a preliminary rather than a final determination on the merits in
14 federal court. The nature of that sought remedy is not consistent with the manner in which
15 relief traditionally is afforded in habeas via a conditional writ grant. This Court has
16 proceeded with as much alacrity as possible, but it nonetheless has proceeded more in
17 line with what is also expedited habeas procedure under 28 U.S.C. §2243 rather than a
18 direct application necessarily of Rule 65(b).

19 In all events, Petitioners’ invocation of Rule 65(b) most certainly does not override
20 the requirement that Petitioners must have fully and fairly exhausted then-available tribal
21 judicial remedies. They have not done so here.

22 **C. Petitioners Have Not Established an Exception to Exhaustion**

23 Petitioners otherwise have not established the applicability of an exception to the
24 exhaustion requirement that would tip the balance to instead excusing that requirement
25 in this case. As discussed below, Petitioners disagree with various procedural actions by
26 the tribal courts. Petitioners have not established, however, that those procedural actions,
27 *inter alia*, are inconsistent with ICRA, render exhaustion futile, or deprive Petitioners of
28 an adequate remedy in the tribal courts.

1 Petitioners contend specifically that the exhaustion requirement (if not instead
2 actually satisfied as they contend it was) should be excused because: (1) in requiring
3 separate petitions to be filed, the Tribal Court (thereafter upheld by the Inter-Tribal
4 Appeals Court) allegedly refused to enforce tribal habeas rules and “invented an *ad hoc*
5 procedure” using instead civil procedure rules, in order “to thwart” Petitioners; and (2) (a)
6 the Inter-Tribal Appeals Court failed to respond to Petitioners and issued its decision and
7 order with “no briefing schedule nor fair process of any kind . . . leading up to” the decision,
8 “totally exclud[ing]” and “shutting out” Petitioners, while (b) at the same time “working
9 hand in glove with Respondent” while the appeals court “communicated *ex parte* with
10 Respondent’s court.” Petitioners contend that these alleged circumstances satisfy a bad
11 faith exception to the exhaustion requirement under *Grand Canyon Skywalk, supra*. (ECF
12 No. 1 at 30-31; ECF No. 20 at 4-7.)

13 Under *Grand Canyon Skywalk*, bad faith will excuse exhaustion if the tribal court’s
14 assertion of tribal jurisdiction is motivated by a desire to harass or the tribal court conducts
15 the proceeding in bad faith. Alleged bad faith by a litigant in the proceeding, as opposed
16 to by the tribal court itself, “will not suffice.” 715 F.3d at 1201-02.

17 On its face, treating Petitioners’ habeas proceeding in tribal court as a civil
18 proceeding and applying civil procedure rules regarding matters such as verification,
19 service, and joinder was neither novel nor indicative of bad faith. Habeas proceedings in
20 federal court and Nevada state court constitute civil proceedings subject potentially to the
21 application of general civil procedural rules. See, e.g., Habeas Rule 12; NRS § 34.780(1).
22 That is why, *inter alia*, this Court required service on Respondents under Rule 4 of the
23 Federal Rules of Civil Procedure. Petitioners urge that, in contrast to federal and Nevada
24 practice, Washoe Tribal Law and Order Code § 4-10-040 instead is “exclusive.” (ECF No.
25 1 at 30-32.) Yet the material quoted from § 4-10-040 does not state that the provisions
26 therein are “exclusive” of any other civil procedure rules potentially applicable to a tribal
27 court habeas proceeding. (*Id.* at 31.) Nor does the section state that habeas petitioners
28 have an unqualified right to join their claims in a single petition, and the language in fact

1 speaks only of a petitioner in the singular. In the final analysis, the Inter-Tribal Appeals
2 Court, which affirmed on the joinder issue, is the final arbiter of tribal procedural law. *Cf.*
3 *Rudin v. Myles*, 781 F.3d 1043, 1054 (9th Cir. 2014) (stating that state supreme court was
4 final arbiter on state law procedural issue). While Petitioners read tribal procedural law
5 differently than did the tribal courts, their disagreement with the tribal courts on the
6 procedural issue does not establish any impropriety or bad faith.

7 Nor was the summary adjudication of Petitioner's emergency appeal, on its face,
8 either novel or indicative of bad faith. Petitioners filed an appeal designated as an
9 "emergency" appeal with six mostly single-spaced pages of detailed legal argument
10 presenting their position as to why they believed immediate relief was needed. (ECF No.
11 1 at 28-36.) The Inter-Tribal Appeals Court responded reasonably expeditiously with a
12 decision and order that, while affirming on the joinder issue, spoke extensively to
13 Petitioners' core underlying desire for prompt consideration of their respective challenges
14 to their continued detention. (See text, *supra*, at 9-10.) Under established Ninth Circuit
15 law, "a tribe's summary adjudication of appeals does not by itself render appeals futile or
16 remedies inadequate." *Selam*, 134 F.3d at 954. Rather, "except to the extent demanded
17 by . . . [ICRA], the structure and procedure of [tribal] courts may be determined by the
18 tribes themselves." *Id.* (quoting prior authority). Here, Petitioners took the opportunity to
19 present written argument in support of their emergency appeal and received a reasonably
20 prompt adjudication that provided not insubstantial procedural relief, albeit not within a
21 joint proceeding as they wished. Nothing in that situation indicates bad faith.

22 Finally, the sequence of forwarded emails upon which Petitioners rely does not
23 establish bad faith by the tribal courts.¹⁰

24 The first five emails in the sequence, from June 17 and 18, 2021, are between
25 Shannon Guerrero and Deserea Quintana. The first four of the five emails concern steps
26

27 ¹⁰Petitioners and the Tribal Respondent both rely on the emails for different
28 purposes, and the Court therefore takes their authenticity as a given for purposes of the
present discussion.

1 being taken by Guerrero to gather the lower court record materials and transmit them via
2 email attachments to the appeals court. In the fifth email, Quintana reports back to
3 Guerrero that the justices had notified her that the cases were under review and were
4 being processed, perhaps as confirmation that the appeals court had the record materials
5 that it needed from the lower court to proceed with the appeal. (ECF No. 19-2.)

6 The Response identifies Guerrero as the “Washoe Tribal Court Clerk.” (ECF No.
7 19 at 9.) That description is consistent with contemporaneous file stamps and such in the
8 copies of tribal court materials filed by Petitioners that identify Guerrero as the Clerk of
9 the Tribal Court. (See ECF No. 1 at 42-43, 46, 48-49, 51, 53, 54, 56, 57-58.) The
10 Response identifies Quintana as the “ITCA Court Coordinator,” whereas her emails list
11 her position as “Executive Director” of the “Inter-Tribal Council of Nevada.” (*Compare*
12 ECF No. 19 at 9 *with* ECF No. 19-2 at 3.) It would appear from the subject matter of the
13 emails, however, that Quintana’s then specific function at the time indeed was in
14 connection with clerical or administrative duties for the appeals court vis-à-vis the
15 emergency appeal. Petitioners’ counsel sent an email inquiry to a different email address
16 also at “itcn.org” when attempting to contact the Inter-Tribal Appeals Court. (See text,
17 *supra* at 8 & n.6.) It thus would appear to be undisputed that Quintana’s organization was
18 the contact organization for the appeals court. (See *also* ECF No. 1 at 8.)

19 There is nothing remarkable about such email communication between the clerical
20 staff of a lower court and an appellate court with regard to the transmittal of the record on
21 appeal. Communications of this nature and for this purpose between the clerks’ offices of
22 federal district courts and federal appeals courts are not uncommon and do not at all
23 signify that either court is engaging in bad faith.

24 What was remarkable, however, was that on June 19, 2021, Guerrero forwarded
25 the above sequence of emails to “WT Prosecutor.” (ECF No. 19-2 at 2.) The Tribal
26 Respondent six days later attached the email sequence to the June 25, 2021, Response
27 in an effort to establish that the appeals court was functioning and that the appeal was
28

1 being processed. (ECF No. 19 at 2 & 9-10.)¹¹ Forwarding of such intra-judiciary clerk-to-
2 clerk emails to a person identified with a litigant would be irregular within the federal
3 system. That said, the lower court clerical employee's forwarding of the emails to the tribal
4 prosecutor does not remotely suggest that the judges of the two courts were "working
5 hand in glove with Respondent" and conducting the proceedings in bad faith. While the
6 forwarding specifically of the clerk-to-clerk emails was perhaps irregular, an *ex parte*
7 communication between a litigant and a court clerk regarding the status of a matter
8 otherwise generally is neither improper nor indicative of bad faith, and certainly not of bad
9 faith by a court's judges. Indeed, over two weeks earlier, Petitioners' counsel also sought
10 to contact the appeals court on an *ex parte* basis regarding the status of the appeal, albeit
11 without generating a response at that early juncture. (See ECF No. 1 at 7-8 & 60.)

12 The emails that were presented herein to demonstrate that the appeals court was
13 functioning neither establish bad faith by the tribal courts nor warrant further inquiry.¹²

14 The Court therefore does not find that the bad faith exception applies to excuse
15 the exhaustion requirement or that the exhaustion requirement otherwise should be
16 excused in this case. *See also Grand Canyon Skywalk*, 715 F.3d at 1203 (stating that the
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20 ¹¹Such an effort actually was unnecessary by that point because the Inter-Tribal
21 Appeals Court already had issued a Decision and Order on June 21, 2021.

22 ¹²Petitioners urge that the Tribal Respondent should be required to produce all *ex*
23 *parte* communications with the appeals court. (ECF No. 20 at 5.) Nothing before the Court
24 suggests that further inquiry on this collateral matter is warranted, would reasonably likely
25 lead anywhere material to the exhaustion issue, or would be a prudent application of time
26 and resources by the Court or the parties. The Court has seen enough with this particular
27 record material to determine that prolonging the current federal litigation to pursue the
28 peripheral matter of possible *ex parte* emails of this nature is unwarranted. Discovery
otherwise is not available as a matter of right in habeas proceedings. *Cf.* Habeas Rule 6.
For the foregoing reasons, the Court does not find that good cause for such discovery
has been shown here (assuming for this discussion the propriety of such a request when
embedded within a traverse rather than presented by separate motion).

futility exception “applies narrowly to only the most extreme cases,” such as possibly a two-year delay or there being no functioning tribal court).¹³

The Court accordingly will dismiss the action without prejudice for lack of complete exhaustion. The Court finds that a dismissal without prejudice rather than a stay is appropriate as Petitioners will suffer no collateral prejudice from a dismissal rather than a stay, given that, *inter alia*, no adverse limitations period consequences are implicated.¹⁴

V. CONCLUSION

It is therefore ordered that Petitioners’ emergency motion for a temporary restraining order (ECF No. 2) is denied.

It is further ordered that the Petition (ECF No. 1) is dismissed without prejudice for failure to fully exhaust available tribal judicial remedies.

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¹³Petitioners’ assertions that the Tribal Respondent is not being completely truthful about trial settings and that Respondent has not responded specifically to, *inter alia*, their allegations about being pressured to waive their jury trial rights do not lead to a different outcome on the exhaustion issue. Petitioners can pursue all such assertions in the tribal court proceedings outlined in the appeals court order if relief is timely sought. This Court notes, however, that, given the advance scheduling required, one possible approach to resuming jury trials after a pandemic-related suspension would be to set trials in advance before the suspension was actually finally lifted, in anticipation of the suspension being lifted. Waiting to set jury trials until the first day a jury trial could be *held*, *i.e.*, the first day the suspension officially is lifted, could result in further delay. In all events, such matters remain to be explored by the parties in the tribal courts if relief is timely sought.

¹⁴Neither this order nor any prior order herein reflects any determination, one way or the other, as to the merits on the detention issues in Petitioners’ cases or any other issue, including joinder in federal court, not expressly addressed by the Court.

1 The Clerk of Court is directed to enter judgment accordingly and close this case.¹⁵

2 DATED THIS 9th Day of July 2021.

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5 MIRANDA M. DU
6 CHIEF UNITED STATES DISTRICT JUDGE
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20 ¹⁵A certificate of appealability is not required in this context under 28 U.S.C. §
21 2253(c)(1) because, although the Court is issuing a final order, neither the detention
22 challenged arises out of state process nor is this a proceeding under 28 U.S.C. § 2255.
See, e.g., Forde v. U.S. Parole Commission, 114 F.3d 878 (9th Cir. 1997); *see generally*
Wilson v. Belleque, 554 F.3d 816, 824-25 (9th Cir. 2009).

23 Petitioners should note that failing to timely pursue the remedies outlined in the
24 Inter-Tribal Appeals Court's June 21, 2021, decision and order (*see text, supra*, at 9-10)
25 would not lead to exhaustion being excused via alleged futility. *See, e.g., Selam*, 134 F.3d
26 at 954 n.6; *see also* 1 F. Cohen, *supra* (stating that petitioners may not avoid exhaustion
27 by waiting until the time to pursue an available tribal remedy has lapsed).

28 Finally, subject to proper invocation of Rules 59 and/or 60, any further federal
habeas relief sought by Petitioners, following exhaustion of tribal judicial remedies or
otherwise, must be pursued in a new action or actions under a new docket number or
numbers. The Clerk's entry of judgment herein closes this action.